app436-99k

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 436 OF 1999

IN

SUIT NO. 1773 OF 1987

1. Shri Vasant Bhaskar Parulkar,
   Indian Inhabitant, residing at
   "Ameya", 4th floor, Kashinath
   Dhuru Road, Near Kirti College,
   Bombay 400 028.
2. Dr. Moreshwar Shivram Pege,
   Indian Inhabitant, residing at
   42, Kelusk[ar] Road, Shivaji Park
   Bombay 400 028.
3. Smt. Manorama Damodar Kamat,
   Indian Inhabitant, residing at
   "Shubhayoga" , Akalpit Coop.
   Hsg. Society, L. J. Road, Mahim,
   Bombay 400 016.
4. Shri Shripat Shivram Rege,
   Indian Inhabitant, residing at
   Rambhau Parulekar Vidyaniketan,
   Talegaon, Dabhade, Taluka Maval,
   Dist. Pune.
5. Shri Shashikant Maharudra Nadkarni,
   Indian Inhabitant, residing at
   A/16, Shan[ti] Coop. Housing Society,
   Mahim, Bombay 400 016. ... . Appellants

vs.

Shri Mahesh Shivram Rege
Indian Inhabitant, residing at
A/16, Shanti Coop. Housing Society,

Mahim, Bombay 400 016. .... Respondent

Mr. V. A. Thorat, Sr. Advocate with Shri Gupte i/b. Warekar for appellant.
Mr. P. G. Karande advocate for respondent.

CORAM: R.M.S. KHANDEPARKAR

AND

D. G. KARNIK JJ.

RESERVED ON: 23RD March, 2007

DELIVERED ON : 4th June, 2007.

JUDGMENT: (Per KARNIK J.)

1. This appeal by the original plaintiffs is directed against the judgment and order dated September 10, 1998 passed by a learned Single Judge dismissing appellants' suit No. 1773 of 1987 with costs.

2. Appellants are the trustees of Balmohan Vidyamandir Trust (hereinafter referred to as “the Trust”), a public charitable trust registered under the Bombay Public Trusts Act, 1948. They filed a suit against the respondent for possession of a flat (hereinafter referred to as the suit flat) situated on the rear side of the first floor of the building at 42, Kaleskar Road, Shivaji Park, Mumbai 28 (hereinafter referred to as the suit

building). By the impugned judgment the suit was dismissed.

3. The case of the appellants- plaintiffs is that Mr. Shivram Dattatraya Rege (for short "Shivram") was the founder and managing trustee of the Trust. In the year 1940 Shivram took on lease the suit flat along with two flats on the ground floor of the suit building on monthly rent of Rs.155/- from the Court Receiver, High Court, Bombay, who was appointed as the receiver of the suit building by the High Court in Suit No. 971 of 1940. The tenancy in respect of all the three flats was one. All the three flats were initially used by Shivram for running a school / coaching classes, while he resided with his family in one room of the suit flat. In or about May 1946 the school / classes conducted in the suit flat were shifted to the main school building and Shivram started occupying the suit flat for residence of himself and the family. On 28th March 1955, by a deed of declaration dated 28th March 1955, (Exhibit P-40) registered in the Office of the Sub Registrar of Assurances Shivram unconditionally, unreservedly and without any consideration transferred and

relinquished of his claim and interest in the properties mentioned in the schedules A and B to the said declaration in favour of the Trust. Schedule A contains list of two immovable properties, viz. the first, his leasehold interest in the piece and parcel of land bearing plot nos. 59, 61, 63, 61 of G Ward No. 4379 (4) at Kaleskar Road, Shivaji Park, Mumbai 28 together with main building of the school and the second, his monthly tenancy rights in respect of the suit flat and two flats on the ground floor of the suit building. Shivram, who was the managing trustee of the Trust continued in occupation of the suit flat till his death on 8th June 1982. His one son Dr. Moreshwar, the appellant no.2, lived with him in the suit flat till 1975 and again from from the year 1979 till the death of Shivram. Between the years 1975 and 1979 the appellant no.2, who was also the principal of the school run by the Trust resided in the premises provided by the Trust in the main building of the school. After the death of Shivram the Trust , by a resolution dated 12th April 1983, appointed the appellant no.2 as the

managing trustee of the Trust and also allowed him to occupy the suit flat. The respondent , who is another son of Shivram, lived separately in the flat of his mother-in-law at Bandra. However, after the death of Shivram he trespassed in the suit flat. Proceedings under section 145 of the Criminal Procedure Code were initiated but therein the Trust could not secure possession of the suit flat. The appellant no.2 then filed a suit in his personal capacity against the respondent for eviction. However, on account of family relationship the suit was not pursued by him and was withdrawn. Finally the Trust through all the trustees filed the present suit in April 1987 against the respondent for eviction.

4. The respondent contested the suit and filed a written statement. The respondent admitted that Shivram was a tenant of the suit flat along with two flats on the ground floor of the suit building. He also admitted that the tenancy in respect of all the three flats was one and only one rent receipt was issued initially by the Court Receiver and then by

Durgaprasad Parshurampurya, who subsequently purchased the suit building in a court auction. He, however, contended that Shivram had no authority to create a trust in respect of the suit flat and the two flats on the ground floor of the suit building, as the premises were not owned but were only taken on rent by him. He further contended that neither the court receiver nor the subsequent landlord Durgaprasad ever accepted the Trust as a tenant of the suit flat. Durgaprasad had filed a suit, bearing RAE Suit No. 385 / 1724, of 1973 against Shivram for ejectment on the ground of breach of conditions of tenancy by change of user of the suit flat. He further contended that the suit flat all along was used by Shivram and his family members for their personal use and residence which also showed that the tenancy rights in the suit flat were not the Trust property. He therefore contended that the declaration of trust (Exh. P-40) dated 18th March 1955, in so far as it sought to transfer the tenancy rights in the suit flat along with two flats on the ground floor of the suit building was void. The respondent, however, did not

stake any claim in respect of the tenancy rights in two flats on the ground floor of the suit building and they are not the subject matter of the suit. The respondent further contended that he had inherited the tenancy rights in the suit flat under section 5(11)(c) of the the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (for short ' he Bombay Rent Act') as he was living with Shivram in the suit flat at the time of his death as a member of his family.

5. The learned Single Judge framed the issues and recorded the evidence of the parties. Parties adduced documentary evidence most of which were admitted by each other. The appellant examined the appellant no.2 Dr. Moreshwar Rege (P.W.1) as also one Devji Hari Revale (P.W. 2), who was a peon of the school Bal Mohan Vidya Mandir run by the Trust and had since retired from service. The respondent examined himself as also one Dr. Ameet Yeshwsant Paranjpe, his neighbour , in support of his defence. Compilation of the admitted documents was filed and most of the documents were exhibited by consent of both the parties. After

considering the oral and documentary evidence adduced by the parties the learned Single Judge held that the purported transfer of tenancy rights in the suit flat by Shivram in favour of the Trust, being prohibited by section 15 of the Bombay Rent Act, was illegal and void. He further held that as the transfer of tenancy was illegal, Shivram continued to be the tenant of the suit flat till his death and that on his death the tenancy rights in the suit flat were inherited by the respondent under section 5 (11)(c) of the Bombay Rent Act. The learned Single Judge, however, negatived the other defences of the respondent that the suit was barred by Order 2 Rule 2 or Order 23 Rule 1 of the Code of Civil Procedure as also that he had no jurisdiction to entertain and try the suit in view of the provisions of the Bombay Rent Act. However, in view of the finding on the main issue that the transfer of tenancy in respect of the suit premises was invalid the learned Single Judge dismissed the suit. Aggrieved plaintiffs are in appeal.

6. We have heard learned counsel for the parties. Following

points arise for our consideration:

1. Whether the transfer of tenancy rights in the suit flat by Shivram in favour of the trustees of Bal Mohan Vidya Mandir Trust by the declaration dated 28th March 1955 was contrary to law being prohibited by the Bombay Rent Act?
2. What is the effect of subsequent amendments made in the Bombay Rent Act made by the Bombay Rents, Hotel and Lodging House (Amendment) Act, 1959 (Bombay Act No. 49 of 1959) and the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973 (Maharashtra Act No. 17 of 1973) on the transfer of tenancy made earlier.
3. Whether the withdrawal of the suit No. 7170 of 1983 filed by Dr. Moreshwar, the appellant no.2 herein, would have operated as a bar against the filing of the present suit by the appellants as trustees of Bal Mohan Vidya Mandir Trust?

Regarding point no.1

7. The appellants have produced on record, at Exh.P-40, the original deed of declaration dated 28th March 1955 executed by Shivram who was the founder of Bal Mohan Vidya Mandir School run at Shivaji Park, Dadar. By the said deed of declaration Shivram created the Trust, known as Bal Mohan Vidya Mandir Trust, and also unconditionally, unreservedly and without any consideration transferred upon himself , Nilkant Balkrishan Rangnekar and Vishram Purshottam Sabnis , as trustees of the Trust, all the properties mentioned in Schedule A and Schedule B of the said deed of declaration. The property at serial no.2 of Schedule A of the said deed of declaration is the property consisting of tenancy rights in the suit flat and two flats on the ground floor of the suit building. Thus, by the said deed of declaration Shivram purportedly transferred his tenancy in the suit flat in favour of the trustees of the Trust. Execution of the deed of Trust (Exh. P-40) was not disputed before us by the respondent. What was however, contended that Shivram was not competent in law

to create a Trust in respect of the tenancy rights in suit flat firstly because he was not the owner but only a tenant therein and secondly because any transfer or assignment of tenancy rights was prohibited by the Bombay Rent Act. Counsel for the respondent submitted that the tenancy rights in the suit flat were not a property and therefore Shivram was not entitled to transfer the tenancy rights in suit flat to the Trust. Alternatively he submitted that section 15 of the Bombay Rent Act, as it stood on the date of purported transfer, i.e., on 28th March 1955, contained an absolute prohibition on the tenant from subletting, assigning or transferring his interest in the tenanted premises in any manner. Shivram was therefore not competent to transfer the tenancy rights and the purported transfer of tenancy rights made by Shivram was invalid ab initio and was not binding on the landlord as well as on the respondent. Lastly he submitted that even after the purported transfer of the tenancy rights in favour of the Trust the land lord did not accept the Trust as the tenant; even after the purported transfer Shivram continued to possess

and occupy the suit flat for the residence of himself and the family members and that would show that the purported transfer was not only invalid but was not acted upon, both by the landlord as well as the tenant Shivram. The purported transfer of tenancy rights in the suit flat not having been acted upon either by the landlord or the tenant was invalid and not binding on the respondent.

8. Section 105 of the Transfer of Property Act 1882, defines the lease of an immovable property as a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lease undoubtedly is a transfer of interest in the property and so a monthly lease which means a lease for a month renewable every month, would also be a transfer in the interest in the property, that is transfer of a right to use the property for the unexpired period of the lease

for a month. Clause (j) of section 108 of the Transfer of Property Act, 1882 provides that a lessee may transfer absolutely or by way of a mortgage or sub lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. Section 108 (j) of the Transfer of Property Act thus recognizes the right of a lessee to transfer his leasehold interest in the property. Such transfer may be absolute, that is by way of an assignment or may be limited, that is, by way of a mortgage or sub lease. Ofcourse, section 108 of the Transfer of Property Act is subject to the contract to the contrary. The lessor and the lessee may, by an agreement, agree that the lessee shall not transfer his right either absolutely or even partially. But unless there is a contract between the lessor and the lessee prohibiting transfer a lessee is entitled to transfer his leasehold interest (including an interest as a monthly tenant) either absolutely or partially unless the contract between the parties prohibits such transfer. The legislature of Maharashtra, however, by enacting the Bombay Rent Act

imposed a restriction on the right of a lessee to transfer his leasehold interest. Section 15 of the Bombay Rent Act, as it stood in the year 1955 when the transfer of the tenancy rights was effected by Shivram, provided that notwithstanding anything contained in any law, it would not be lawful after the coming into operation of this act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein. Thus notwithstanding anything contained in section 108 of the Transfer of Property Act , so far as the areas of the State of Maharashtra, to which Bombay Rent Act is applicable are concerned, a tenant is not entitled to assign or transfer his tenancy rights to anyone. This was the position on 28th March 1955 when the deed of declaration of trust (Exh. P-40) was executed by Shivram. In Philatelie Orient vs. Kodak Limited , reported in **57 Bom. L.R. 175**, on which strong reliance was placed by the learned counsel for the respondent, this court had held that section 15 of the Bombay Rent Act prohibits sub lease, transfer or assignment of a

tenancy and except in cases covered by proviso to section 15, a tenant is not entitled to sublet, transfer or assign his tenancy rights. Admittedly there was no notification issued by the Government under proviso to section 15 of the Bombay Rent Act, prior to 28th March 1955 permitting transfer of tenancy rights by a tenant in favour of a trust for educational purposes. Some notifications were, however, issued by the State Government permitting assignment of tenancy by a tenant in certain circumstances or for certain purposes. The learned Single Judge has held that subsequent notifications issued by the Government had no retrospective effect. In view of our finding on point no.2 it is not necessary for us to consider whether the subsequent notification issued by the Government would have a retrospective effect and retrospectively validate any transfer which was not valid when made. Suffice it to say that on 28th March 1955 when the transfer of tenancy rights was effected by Shivram in favour of the Trust there was a complete prohibition on transfer of tenancy rights. Therefore the transfer of tenancy

rights in the suit flat was illegal when it was made. As the transfer was illegal the landlord rightly did not accept the Trust as a tenant in place of Shivram. It is for this reason that Durgaprasad who had purchased the suit building from the receiver filed a suit against Shivram and not the Trust for possession. We accordingly answer point no.1 in the affirmative.

Regarding point no.2

9. Section 15 of the Bombay Rent Act was amended by The Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1959 (Bombay Act No. 49 of 1959). The prohibition against sub letting or assignment of tenancy rights a tenant made prior to the coming into force of The Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance , 1959 was retrospectively removed by inserting sub section (2) in section 15 of the Bombay Rent Act. Sub Section (2) as inserted in section 15 of the Bombay Rent Act by Maharashtra Act No. 49 of 1959 reads as under:

> "(2) Notwithstanding anything contained in any judgment, decree or order of a Court or any contract, the bar agaisnt sub- letting, assignment or transfer of premises, contained in sub-section (1) or in any contract shall, in respect of such sub- lessees, assignees or transferees as have entered into possession despite the bar before the commencement of The Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance , 1959 and as continue in possession at such commencement, have no effect and be deemed never to have had any effect".

10. The effect of amendment of addition of sub section (2) in section 15 of the Bombay Act No. 49 of 1959 is to retrospectively remove the prohibition against assignment or creation of sub tenancy by a tenant. Not only that such

prohibition was removed retrospectively but even the decrees which were passed a sub tenant or an assignee who continued to remain in possession on the date of coming into force of the Bombay Rents, Hotel and Lodging House Rates Control Amendment (Ordinance) 1959 were rendered ineffective and in-executable. As the prohibition against the subletting and / or assignment of the tenancy has been retrospectively removed it must be held that the assignment made on 28th March 1955 by Shivram in favour of the Trust ceased to be illegal and the illegality was retrospectively removed by Maharashtra Act 49 of 1959.

11. The Bombay Rent Act was further amended by The Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973 (Maharashtra Act no. 17 of 1973). Sub section 2 of section 15 of the original Act as substituted by the amendment reads thus :

> "(2) The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the

assignment or transfer in any other manner of the interest of the tenant therein, contained in sub- section (1), shall, subject to the provisions of this sub- section be deemed to have had no effect before the 1st day of February, 1973, in any area in which this Act was in operation before such commencement; and accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order a Court, any such sub- lease, assignment or transfer in favour of any person who has entered into possession, despite the prohibition in sub- section (1) as purported sub- lessee, assignee or transferee and has continued in a possession on the date aforesaid shall be deemed to be valid and effectual for all purposes, and any tenant who has sub-let any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (1) of section 13.

The provisions aforesaid of this sub -section shall not affect in any manner the operation of sub- section (1) after the date aforesaid."

12. Sub section (2) of section 15 of the Bombay Rent Act as amended specifically lays down that the prohibition against subletting or assignment or transfer by a tenant of his interest in the tenanted premises contained in sub section (1) shall not be deemed to have any effect before the 1st day of February 1973, in any area in which the Bombay Rent Act was in operation before such commencement. The prohibition against subletting or assignment of a tenancy contained in sub section (1) of section 15 of the Bombay Rent Act was thus retrospectively removed and assignment of his interest in the tenanted premises made by a tenant prior to 1st February 1973, is not invalid.

13. The definition of tenant appearing in section 5(11) of the Bombay Rent Act was also amended by the Maharashtra Act no.17 of 1973. Clause (aa) of section 5(11) of the Bombay Rent Act, as amended provides that the tenant includes any person to whom interest in the premises has been assigned or transferred as permitted or deemed to be permitted under

section 15. We have already mentioned that section 15 of the Bombay Rent Act , as amended by Maharashtra Act No. 17 of 1973 permitted and legalized subletting or assignment of tenancies made by a tenant prior to 1st February 1973. By virtue of clause (aa) of section 5 (11) such assignee is deemed to be a tenant of the landlord. Thus looked at from any angle, the Trust became the tenant of the suit flat with effect from 1st February 1973 by virtue of amendment to the Bombay Rent Act by Maharashtra Act No. 17 of 1973. It is worthwhile to note that though Durgaprasad, the landlord, had filed a suit against Shivram for possession he subsequently withdrew the suit. May be that initial assignment of tenancy in favour of Shivram was not valid and therefore Durgaprasad was justified in filing the suit against Shivram as a tenant ignoring the transfer or assignment of tenancy made by him in favour of the Trust on 28th March 1955. However, in view of the amendment of the Bombay Rent Act by the Maharashtra Act No. 17 of 1973 whereby not a transfer and assignment of tenancy rights made by a tenant

prior to 1st February 1973 was legalized but the transferee and assignee was made a tenant by amendment of section 5 (11) thereof, Durgaprasad could not have continued the suit against Shivram for possession as he ceased to be the tenant. As the Trust became the tenant from 1st February 1973, perhaps realizing the futility of his contention that Shivram was the tenant, Durgaprasad withdrew the suit filed by him against Shivram. The withdrawal of the suit was in accordance with the true legal position brought about by the amendment of the Bombay Rent Act.

14. For the reasons mentioned above and without going into the question as to whether the assignment of a tenancy by Shivram in favour of the Trust made on 28th of March 1955 by a deed of declaration / Trust (at Exhibit P-40) was regularized by reason of any Notification under section 15 of the Bombay Rent Act and without considering the question whether the notifications could not have a retrospective effect as held by the learned Single Judge, we hold that the prohibition against subletting and assignment was

retrospectively removed by Bombay Act No. 49 of 1959 and also by Maharashtra Act no.17 of 1973. We further hold that by reason of amendment to section 5 (11) of the Bombay Rent Act made by Maharashtra Act No.17 of 1973 the Trust became the direct tenant of the landlord.

15. Learned counsel for the respondent submitted that the Trust was not in possession of the suit premises on 1st February 1973 and therefore the assignment of the tenancy rights made by Shivram in favour of the Trust on 28th March 1955 was not regularized by the Maharashtra Act no.17 of 1973. We find no merit in the submission. Admittedly Balmohan Vidyamandir School was founded by Shivram. The Trust was also formed by him. The suit property as well other properties of the school were donated by him to the Trust under the very deed of declaration dated 28th March 1955. He himself was a trustee of the Trust under the said deed of declaration. He was the Managing Trustee of the Trust and his name was recorded as such in the records of the Charity Commissioner (Ex. P-4). We have no doubt in our mind that

he was not only the trustee but but perhaps the sole person in charge of the school and the Trust. After the Trust was created the rent of the suit flat was paid by the trust. In para 4 of his deposition the appellant no.2 has stated that the rent was paid by cheques by the trust and that the suit flat was used by his father Shivram, as the Managing Trustee and Superintendent of the school and also for other activities of the Trust and the school. In his cross examination he has stated that there was only one tenancy in respect of the ground floor and first floor flat at the time of the sale deed. The tenancy in respect of the three flats was one. The two flats on the ground floor are in possession of the Trust and was used by the trust as its property. The respondent never claimed any interest in the two flats on the ground floor. In para 2 of his examination in chief the respondent has admitted that on 28th March 1955 the Trust was formed. He further stated that about 6 / 7 months after the formation of the Trust his father (Shivram) paid the rent. However, thereafter it was decided by the Trust that the rent would be

paid by the trust. Though he has added that the Trust paid rent on behalf of his father there is no evidence to show that the Trust paid the rent on behalf of Shivram. In para 20 of his cross examination the respondent has admitted that the school was paying rent in respect of the suit building. In para 21 of his cross examination he has admitted that the school was being run on the two floors on the ground floor in the suit building. In para 25 he has admitted that his father was the Managing Trustee. If Shivram was the Managing Trustee as is admitted by the respondent there was nothing wrong in the Trust permitting him as the Managing Trustee to occupy the suit premises, especially when he was also the Superintendent and founder of the school and was teaching in the said school. Therefore the occupation by Shivram of the suit flat after the creation of the Trust was not in his personal capacity but as a Managing Trustee and for and on behalf of the Trust. In law the property vests in the trustees and occupation by a trustee and by one of the trustees could well be regarded as occupation of all the trustees, in the facts and

circumstances of the case. We therefore have no hesitation in rejecting the contention of the respondent that the Trust was not in possession of the suit premises on 1st February 1973. In our view, the Trust through the trustees was in possession of the suit premises and therefore the case is squarely covered by sub section 2 of section 15 of the Bombay Rent Act, as amended by Maharashtra Act 17 of 1973.

Regarding point no.3

16. Learned counsel for the respondent submitted that the appellant no.2 had previously filed a suit, bearing suit no. 1720 of 1983, in the City Civil Court at Bombay against the respondent. However, the said suit was not pursued and was withdrawn. He therefore submitted that the second suit by the appellant no.2, merely by joining other co-trustees as co-plaintiffs, against the respondent for possession was not maintainable and was barred by (i) Order 23 Rule 1(4) (ii) Order 2 Rule 2 and (iii) Section 11 of the Code of Civil Procedure.

17. Order 23 Rule 1 of Code of Civil Procedure permits a plaintiff to abandon his suit or any part of a claim in the suit. However, sub rule (4) of Rule 1 provides that where the plaintiff abandons any suit or a part of a claim under sub rule (1) he is precluded from instituting any fresh suit in respect of the same subject matter. Counsel for the respondent submitted that since the appellant no.2 had withdrawn the suit no. 1721 of 1983 unconditionally that amounted to abandonment of the suit and therefore the appellant no.2, either singly or alongwith other co-trustees, was prevented from filing the present suit. In suit no. 1721 of 1983 (Exh. P-9) the appellant no.2 had alleged that in December 1983 the respondent had tried to forcibly enter into the suit premises with an intention to reside there permanently and in the same week had once again attempted to forcibly enter, which he had then prevented. Appellant no.2 in that suit had further alleged that he apprehended that the respondent 's attempted trespass on the property would become continuous source of nuisance. He had therefore prayed for a perpetual injunction

restraining the respondent from entering into or upon the suit flat. It may be noted that in the year 1983, soon after the death of Shivram both parties had staked their claim to the suit flat. Even proceedings under section 145 of the Criminal Procedure Code were initiated though it is not clear what happened to the said proceedings. Both parties claimed to be in possession of the suit flat. It was in these circumstances that suit no. 1721 of 1983 was filed by the appellant no.2 individually (with or without the consent of other trustees) to prevent entry of the respondent in the suit flat. Respondent however, appears to have entered the suit flat and therefore the only remedy for the trustees was to file a suit for possession. We fail to see how withdrawal of a suit for injunction simplicitor would prevent the trustees from subsequently filing a suit for possession or how such suit would be barred under Order 23 Rule 1 of Code of Civil Procedure .

18. Learned counsel for the respondent then submitted that in view of prior suit no. 1721 of 1983, the subsequent suit

from which the present appeal arises, was barred by Order 2 Rule 2 of Code of Civil Procedure. In our view Order 2 Rule 2 has no application whatsoever to the present case. Sub rule (1) of Rule 2 of Order 2 of Code of Civil Procedure provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action but the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. Sub rule (2) of Rule 2 provides that where a plaintiff omits to sue in respect of any portion or intentionally relinquishes any portion of his claim he shall not afterwords sue in respect of the portion so omitted or relinquished. Sub rule (3) of Rule 2 provides that where a person entitled to more than one releif in respect of the same cause of action may sue for all or any such reliefs but he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwords sue for any reliefs so omitted. The object of Order 2 Rule 2 is to prevent a plaintiff from vexing the defendant again and again by filing separate or multiple suit by splitting a cause of actions or

suing separately for each relief arising out of the same cause of action. Order 2 Rule 2 therefore requires the plaintiff to sue in respect of the entire cause of action and for all reliefs arising out of the same cause of action in the same suit and if he omits to sue in respect of any part of the cause of action or any of the reliefs arising out of the same cause of action he cannot file a separate suit again in respect of the claims or reliefs omitted. The basic requirement for prohibiting a plaintiff from filing a second suit is that the second suit must be in respect of the same cause of action as in the former suit. In the present case the cause of action for the former suit no. 1721 of 1983 was a apprehension in the mind of the appellant no.2 that the respondent would try to trespass into the suit property. The apprehension was based upon two attempts of trespass made by the respondent. The cause of action for the second suit arose when the respondent successfully trespassed or entered into the possession of the suit flat. Respondent having entered into the possession of the suit flat the appellant no.2 could not have continued the

suit for injunction simplicitor. The cause of action for the former suit was an attempt on the part of respondent no.2 to enter into the suit flat while the cause of action for the second suit was successful entry of the respondent into the suit flat. The causes of action for the two suits being entirely different the second suit was not barred by Order 2 Rule 2 of Code of Civil Procedure.

19. As regards the submission of the respondent that the second suit was barred by principles of res judicate it must be noted that the former suit was never decided. It was withdrawn. There was no decision in the former suit and therefore there is no question of any decision in the former suit operating as res judicate in the second suit. Thus none of the grounds set up by the respondent for the non-maintainability of the suit have any force and have to be rejected.

20. Learned counsel for the respondent referred to and relied upon a decision of the Supreme Court in **Vasant Pratap Pandit Vs. Dr. Anant Trimbak Sabnis** affirming the decision

of the Bombay High Court, reported in **AIR 1980 Bombay 69**. **Therein** it was held that a person cannot transfer the tenancy rights under a will as such transfer would amount to breach of section 15 of the Bombay Rent Act. In our view this case has no application in the present case since the transfer of tenancy in the present case was made on 28th March 1955 and the prohibition against transfer of tenancy was removed by the two amending Acts as stated earlier. The respondent, therefore, cannot derive any support from the said decision.

21. In the conclusion we hold that Shivram did effect transfer of his tenancy rights in the suit premises in favour of the Trust by executing a deed of declaration dated 28th March 1955 (Exh. P-40). The prohibition against the transfer of tenancy rights contained in section 15 of the Bombay Rent Act as it stood in the year 1955 was retrospectively removed by amendments made to the Bombay Rent Act by Bombay Act No.49 of 1959. Further more all assignments of tenancy made prior to 1st February 1973 were retrospectively

legalized and validated by Maharashtra Act no.17 of 1973 and the assignees are regarded as tenants. In the circumstances the finding by the learned Single Judge that the assignment of the tenancy rights in respect of the suit flat made by Shivram in favour of the appellant by the deed of declaration dated 28th March 1955 was illegal has to be set aside. Since the Trust was and Shivram was not the tenant at the time of his death in respect of the suit flat the respondent did not and could not inherit the tenancy under section 5 (11) of the Bombay Rent Act. He has no right to occupy the suit premises as a tenant or as an heir of Shivram, as Shivram himself had no right in the suit premises after the execution of the deed of declaration dated 28th March 1955. His possession after 28th March 1955 was not in his individual capacity but on behalf of the Trust as a managing trustee thereof. Respondent therefore has no right to continue in possession of the suit premises and must yield the possession to the appellants. For these reasons the appeal is allowed and the impugned judgment is set aside. The

respondent is directed to quit, vacate and deliver vacant possession of the suit flat to the appellants within 4 months.

(R.M.S. KHANDEPARKAR J.)

(D. G. KARNIK J.)